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No. 451

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

THE CITY NATIONAL BANK AND TRUST COMPANY, TRUSTEE,
UNDER TRUST AGREEMENT WITH HAMILTON DEPOSITORS
OF HAMILTON TRUST SHARES, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REHEARING.

MORRISON SHAFROTH,
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Petitioner prays for a rehearing on its petition for certiorari for the following reasons:

This case typifies administrative injustice and judicial confusion.

For years neither the Bureau of Internal Revenue nor the courts conceived the fixed investment trust to be within the orbit of the corporate tax.

For some time prior to the determination of this Court in *Morrissey v. Commissioner*, 296 U. S. 344, various business enterprises had sought to avoid the corporation tax by forms of organization essentially similar to the corporation in nature though not in form. Such was the Massachusetts Trust. The Treasury properly attacked these schemes and in the *Morrissey* case, *supra*, obtained a ruling that

form was immaterial if in substance there was corporate resemblance. There clearly was in that case:—the capital of the enterprise belonged to the group and the interest of the investors was only in the dividends when, as and if declared, not an ownership of the assets themselves.

Having procured this ruling, the Bureau proceeded in its turn to overreach the taxpayer by finding corporate resemblance on immaterial matters of form where in fundamental nature there was no resemblance whatever. In that process it dragged into the scope of its corporate tax regulations the fixed investment trust.

The Tax Court ruled that the fixed investment trust—the vehicle by which the small investor purchases an interest in underlying securities—had no essential resemblance to a corporation. The Circuits divided, as we have pointed out in our brief on petition for certiorari.

This case is the first, however, to openly declare that there need be no beneficial ownership whatever of capital or income by the enterprise or group to enable it to be taxed as though it were a corporation—and, contrary to the admitted fact, as though it actually owned the securities and the income thereon. Said the Circuit Court:

“It is true that if the trustee receives income from the underlying securities,* its receipt creates a corresponding indebtedness to the individual beneficiary and that the beneficial interest of the underlying securities was in the beneficiaries.” (R., p. 289.)

In other words, the Circuit Court itself says that the trust was a conduit without beneficial ownership through which the income flows from Standard Oil and the other underlying corporations to the individual beneficial owners of the securities.

To assert that such income is taxable both to the beneficial owner (which it is without question) AND to the conduit through which it flows is flatly contrary to the most fundamental principles of tax law.

*That is the only income in this case. (Note is our own.)

And all of this is done in the name of the *Morrissey* case.

We realize that the Supreme Court is not a court of error, but we respectfully urge that where the misapprehension of the meaning of a decision of this Court has gone as far as it has in respect of the *Morrissey* case—with Circuit after Circuit arriving at a different conclusion regarding its meaning, with some supporting and some opposing the Tax Court, and with this culminating decision of the Tenth Circuit reading into it an overthrow of so fundamental a principle of tax law—when conflict and misapprehension have gone so far, we respectfully urge that it is the duty of this Court to grant certiorari.

Respectfully submitted,

THE CITY NATIONAL BANK AND TRUST
COMPANY, TRUSTEE, UNDER TRUST
AGREEMENT WITH HAMILTON DEPOSITORS
OF HAMILTON TRUST SHARES.

By MORRISON SHAFROTH,
W. W. GRANT,
HENRY W. TOLL,

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We, the undersigned attorneys for the above named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for purpose of delay.

MORRISON SHAFROTH,
W. W. GRANT,
HENRY W. TOLL,

Attorneys for Petitioner.